

Decision \_\_\_\_\_

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

California Cable & Telecommunications  
Association,

Complainant,

v.

Case 17-11-002

San Diego Gas & Electric Company (U902E),

Defendant.

**DECISION DENYING MOTION TO DISMISS**

**Summary**

The California Cable & Telecommunications Association brings this complaint against San Diego Gas & Electric Company seeking Commission resolution of their dispute regarding pole attachment fees. San Diego Gas & Electric Company filed a timely motion to dismiss the complaint.<sup>1</sup> The motion to dismiss is denied.

**1. Background**

Pub. Util. Code § 767 establishes the Commission's authority to determine the compensation, terms and conditions for a public utility's use of another

public utility's poles or other equipment whenever the public utilities are unable to reach agreement. Section 767.5(c)<sup>2</sup> establishes the Commission's similar authority to determine and enforce pole attachment rates, terms and conditions whenever a public utility and a cable television operator or association are unable to reach agreement. In a seminal 1998 decision, (Decision (D.) 98-10-058 (the "Rights-of-Way (ROW) Decision")), the Commission adopted rules, guidelines and performance standards for negotiated ROW access agreements and an expedited dispute resolution procedure for resolving pole access disputes.

The California Cable & Telecommunications Association (CCTA) and San Diego Gas & Electric Company (SDG&E) entered into a settlement agreement that, among other things, established a pole rate schedule for the years 2009 through 2016 that culminated in a 2016 attachment rate of \$16.35. On September 16, 2016, SDG&E notified CCTA that its 2017 pole attachment rate would increase to \$30.58. Since then, the parties have engaged in negotiations over the proposed 2017 rate, but have reached an impasse.

CCTA brings this complaint seeking Commission resolution of the dispute pursuant to Section 767.5(c). SDG&E moves to dismiss CCTA's complaint on the basis that the ROW Decision's expedited dispute resolution procedure, rather than a complaint, is the appropriate vehicle to resolve this dispute.<sup>3</sup> The Presiding Officer's Decision (POD) dismissing CCTA's complaint in this case was mailed on March 19, 2018. CCTA filed an appeal to the POD on April 18, 2018, and SDG&E filed a response on May 3, 2018.

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<sup>1</sup> SDG&E's Motion to Dismiss, filed Dec. 26, 2017.

<sup>2</sup> All subsequent statutory references are to the Public Utilities Code unless otherwise noted.

<sup>3</sup> SDG&E's Motion to Dismiss, filed Dec. 26, 2017.

## **2. Discussion**

CCTA brings its Complaint under Pub. Util. Code § 767.5(c), which provides that:

Whenever a public utility and a cable television corporation or association of cable television corporations are unable to agree upon the terms, conditions, or annual compensation for pole attachments or the terms, conditions, or costs of rearrangements, the commission shall establish and enforce the rates, terms, and conditions for pole attachments and rearrangements.

SDG&E argues that the Commission should dismiss CCTA's Complaint because the expedited arbitration process set out in the ROW decision is the only vehicle available to CCTA for bringing this dispute before the Commission.

While Pub. Util. Code § 767.5(c) mandates that the Commission intervene in disputes relating to utility pole attachments to establish and enforce the terms, conditions and rates for such attachments, it does not specify the vehicle through which such disputes must be brought before the Commission. Therefore, we consider the ROW decision, and Commission practice and policy, to evaluate SDG&E's argument that CCTA can only bring the instant dispute to the Commission through the expedited arbitration procedure set out in the ROW decision.

### **2.1. ROW decision**

Prior to the ROW decision, the Commission's complaint process was the only vehicle available to parties to pole access disputes to approach the Commission for dispute resolution.<sup>4</sup>

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<sup>4</sup> D.98-04-062.

In the ROW decision, the Commission explicitly mandated use of the expedited dispute resolution procedure for initial pole access disputes, but did not do so for other types of pole access disputes. The relevant section of Appendix A of the decision, which describes the arbitration process, is excerpted below:

“IX. EXPEDITED DISPUTE RESOLUTION

PROCEDURES Parties to a dispute involving access to utility rights of way and support structures may invoke the Commission’s dispute resolution procedures, but must first attempt in good faith to resolve the dispute. Disputes involving initial access to utility rights of way and support structures shall be heard and resolved through the following expedited dispute resolution procedure... [...]

Following denial of a request for access, parties shall escalate the dispute to the executive level within each company...”  
(emphasis added)

Thus, the ROW decision stipulates that arbitration may be initiated following “denial of a request for access”, which does not come into play in disputes such as the one before us, where the party seeking pole access has already secured such access, and the dispute relates only to the terms of such access. The ROW decision discusses this requirement in further detail, in the context of an explanation of prerequisites to be satisfied as evidence of good faith negotiations prior to the Commission’s acceptance of a request for resolution of a ROW dispute:

“The party seeking access must first submit its request to the utility in writing. As discussed previously, we are establishing a default deadline of 45 days for a utility to confirm or deny whether it has space available to grant requests for access to its support structures or ROW. *If the request is denied*, the utility shall state the reasons for the denial or why the requested space is not available... *in the event of a*

*denial, Step 1 of the dispute resolution process is invoked.”<sup>5</sup>*  
(emphasis added)

Notwithstanding the reference to “initial” pole access disputes in Appendix A, other sections of the ROW decision refer to disputes relating to “ROW access” generally in discussing the expedited dispute resolution process, without making a distinction between initial pole access disputes and other types of disputes, and thus creating some ambiguity about the overall intent.<sup>6</sup>

Reading the decision in totality, we conclude that while parties to initial pole access disputes may submit their dispute to the Commission only through the expedited arbitration process, parties to other types of pole access disputes (where access to the utility pole(s) has already been secured) may, at their option, bring their dispute before the Commission through arbitration or through the Commission’s complaint process.

There is sound policy rationale for treating initial pole access disputes differently from other types of pole access disputes. Prompt dispute resolution is particularly critical with regards to initial access disputes. Without initial pole access, a party seeking such access cannot deliver its services and is thus precluded from entering a specific market pending resolution of the dispute. On the other hand, in cases where initial pole access has already been secured, the non-utility party continues to have access to the pole during the pendency of the dispute, and is thus not foreclosed from operating in the market during this time.

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<sup>5</sup> D.98-10-058, at 109-110.

<sup>6</sup> *Ibid*, at 109-112.

## **2.2. Commission practice following the ROW decision**

As a matter of practice, the Commission has consistently admitted pole access disputes under its complaints process. We do not see reason to depart from this Commission practice.

At least five pole access disputes have been submitted to the Commission through its complaint process. Three of these disputes were dismissed upon stipulation of the parties,<sup>7</sup> one was decided on the merits before the ROW decision<sup>8</sup>, and a fifth dispute was decided on the merits after the ROW decision.<sup>9</sup>

Although limited, Commission precedent subsequent to the ROW decision is particularly instructive. In April 2000, the Commission granted in part, a joint petition by Daniels Cablevision Inc. (“Daniels”) and CCTA for modification of the ROW decision, clarifying that transmission poles are not exempt from rules established by the ROW decision, and that these rules apply identically to transmission and distribution poles (D.00-04-061). That decision referenced a dispute between Daniels and SDG&E regarding payment of an access fee for fiber optic lines attached to SDG&E’s transmission poles, and stated that the ROW rulemaking was not the proper forum for adjudication of a contractual dispute, noting that arbitration or the Commission’s complaint process would be the appropriate vehicle for parties to bring such a dispute before the Commission. In particular, the Commission concluded:

“As to any particular factual disputes existing between SDG&E and Daniels, this rulemaking is not the proper forum.

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<sup>7</sup> See D.98-06-045, D.99-09-040, and D.11-03-002.

<sup>8</sup> D.98-04-062.

<sup>9</sup> D.03-05-055.

Such contractual disputes are better addressed *through an arbitration or the complaint proceeding contemplated under Pub. Util. Code § 767*. A complaint or arbitration would allow the facts of a particular contract dispute to be adjudicated based on a full record.” (emphasis added)

[...]

“Conclusions of Law

5. The parties' specific factual disputes, if any, are properly dealt with through an arbitration or complaint proceeding.”<sup>10</sup> (emphasis added)

Daniels then filed a complaint (Case 00-09-025) jointly with CCTA, which the Commission decided on its merits.<sup>11</sup> The complaint related to a \$6,080 per mile fee that SDG&E attempted to charge Daniels for use of its transmission rights-of-way. In all, Daniels requested permission to attach fiber optic cables to 65 transmission poles. Given the dispute on rates, Daniels constructed underground facilities in lieu of attaching to 29 of the 65 poles. The parties subsequently entered into interim agreements under which SDG&E agreed to process Daniels' application to attach to the remaining 36 poles, with the reasonableness of the terms and conditions of attachment subject to the complaint proceeding. After filing the complaint, Daniels attached to the 36 transmission poles at issue.<sup>12</sup> In its decision on the Complaint,<sup>13</sup> the Commission stated:

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<sup>10</sup> D.00-04-061, at 8, 10-11.

<sup>11</sup> D.03-05-055.

<sup>12</sup> D.02-03-048, at 3-5.

<sup>13</sup> D.02-03-048, at 17-18.

“The [ROW] rules clearly set forth what action parties should take if they cannot come to a mutual satisfactory agreement. According to the rules, parties *are to use an informal process and file a complaint if needed*. In Part II.L, the rules clearly articulate that ROW is defined as the right to obtain access to poles and other structures “necessary to reach customers.” Complainants clearly dispute the terms of access to ROW as defined in our rules, and the dispute between Daniels and SDG&E *has now appropriately risen to the level of a formal complaint in keeping with the process set forth in the ROW rules and in Section 767.5(c).*” (emphasis added)

### **2.3. Additional Argument Raised in SDG&E’s Motion to Dismiss**

In its Motion to Dismiss, SDG&E argues that CCTA may not avail itself of the Commission’s complaint procedures adopted under Section 1701, et seq. as Section 1701.1 provides for adjudication proceedings for enforcement cases and complaints “except those challenging the reasonableness of any rates or charges as specified in Section 1702”<sup>14</sup>, and CCTA’s complaint is “predicated on requesting the Commission to prohibit SDG&E from imposing unreasonable charges.”<sup>15</sup>

We disagree. We interpret “rates or charges of any gas, electrical, water, or telephone corporation” as referenced in Pub. Util. Code § 1702 to refer to the

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<sup>14</sup> SDG&E cites Cal. Pub. Util. Code § 1701.1(d)(2), which references Cal. Pub. Util. Code § 1702. § 1702 states in part: “No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service.”

<sup>15</sup> SDG&E’s Motion to Dismiss, at 8.



retail rates or charges of gas, electrical, water and telephone corporations.

Therefore, the restriction in Section 1702 does not apply here.

### **3. Assignment of Proceeding**

Clifford Rechtschaffen is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge in this proceeding.

### **4. Explanation of Changes to the POD**

Pursuant to Pub. Util. Code § 1701.2(e), this is the explanation of changes made by this decision to the POD. The POD grants SDG&E's motion to dismiss the complaint filed by the CCTA on the basis that the Commission's complaint process is not the proper vehicle for resolving the instant dispute, and closes the proceeding. It concludes that the expedited dispute resolution procedure laid out in the ROW decision is the appropriate vehicle to resolve this dispute.

This decision denies the motion to dismiss, and orders that the proceeding remain open. Further, it concludes that while parties to initial pole access disputes may bring their dispute before the Commission for resolution only through the expedited arbitration process laid out in the ROW decision, parties to all other types of pole access disputes (such as the instant dispute) may, at their option, bring their dispute before the Commission for resolution through this expedited arbitration process or through the Commission's complaint process.

### **Conclusions of Law**

1. Parties to initial pole access disputes may bring their dispute before the Commission for resolution only through the expedited arbitration process laid out in the Commission's "Right-of-Way Order" (Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Rulemaking 95-04-043/Investigation 95-04-044, D.98-10-058).

2. Parties to all other types of pole access disputes may, at their option, bring their dispute before the Commission for resolution through this expedited arbitration process or through the Commission's complaint process.

3. As the instant dispute does not relate to initial pole access, SDG&E's motion to dismiss CCTA's complaint should be denied.

**O R D E R**

**IT IS ORDERED** that:

1. San Diego Gas & Electric Company's Motion to Dismiss California Cable & Telecommunications Association's complaint is denied.
2. Case 17-11-002 will remain open.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.